

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Aquaquim SA de CV, et al.,

10 Plaintiffs,

11 v.

12 Environmental Fluids Incorporated,

13 Defendant.
14

No. CV-22-01576-PHX-MTL

ORDER

15 **I.**

16 This is an action for breach of contract. Plaintiffs Aquaquim SA de CV
17 (“Aquaquim”) and Surfamex S.A. de C.V. (“Surfamex”) (collectively “Plaintiffs”) are
18 Mexican companies. (Doc. 1 ¶¶ 1-2.) Aquaquim is a chemical manufacturer and Surfamex
19 is a product manufacturer. (*Id.* ¶¶ 10-11.) Plaintiffs sue Environmental Fluids, Inc. (“EFI”),
20 an Arizona-based chemical research and production company, for failing to pay on an
21 agreement to manufacture certain chemical products. (*Id.* ¶¶ 5, 12, 14.) According to the
22 Complaint, EFI owes Plaintiffs over \$750,000 for product deliveries that were invoiced
23 between March 2016 and March 2020. (*Id.* ¶¶ 21, 23; Doc. 1-4.)

24 EFI filed a Motion to Dismiss for improper venue under Rule 12(b)(3), Fed. R. Civ.
25 P., arguing that this Court lacks jurisdiction because the parties’ agreement contains a
26 forum selection clause specifying that all disputes must be adjudicated in the courts of
27 Mexico City, Federal District, Mexico. (Doc. 12.) A copy of the parties’ contract is attached
28 to the Complaint as Exhibit A. (Doc. 1-2.) Article Twenty Sixth of the parties’ contract is

1 titled “JURISDICTION” and it states the following:

2 For the interpretation, execution and compliance of this
 3 Agreement the Parties expressly submit themselves to the
 4 applicable laws and to the jurisdiction of the courts of Mexico
 5 City, Federal District, waiving to any other jurisdiction that
 6 may correspond to the Parties by virtue of their present or
 future domiciles or for whatever other reason.

7 (*Id.* at 20.)¹ EFI argues that Article Twenty Sixth is a mandatory forum selection clause
 8 that requires all disputes to be heard in the courts of Mexico City, Federal District.

9 Plaintiffs oppose the Motion for three reasons. First, Plaintiffs argue that Article
 10 Twenty Sixth is a permissive forum-selection clause. This, according to Plaintiffs, allows
 11 the parties to litigate disputes in any court that has jurisdiction. Second, they obtained a
 12 judicial determination from a Mexican court declaring the forum-selection clause
 13 unenforceable. Third, even if it is a mandatory forum selection clause, Plaintiffs argue that
 14 they do not have an adequate alternative forum because the Mexico City court already
 15 declined jurisdiction.

16 II.

17 “Forum selection clauses are presumed valid and should be enforced unless doing
 18 so clearly would be ‘unreasonable and unjust, or the clause was invalid for such reasons as
 19 fraud or overreaching.’” *Aimsley Enters. Inc. v. Merryman*, No. 19-CV-2101-YGR, 2020
 20 WL 1677330, at *5 (N.D. Cal. Apr. 6, 2020) (quoting *Atl. Marine Const. Co. v. U.S. Dist.*
 21 *Court for W. Dist. of Texas*, 571 U.S. 49, 62-63 (2013)). Well-established judicial policy
 22 favors the enforcement of forum selection clauses as representations of the parties’
 23 bargaining and mutual expectations. And a plaintiff bears the heavy burden “to show why
 24 the court should not enforce the forum selection clause.” *Id.*; see also *Yei A. Sun v.*
 25 *Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1084 (9th Cir. 2018) (affirming the
 26 dismissal of a complaint because a plaintiff did not carry “their heavy burden of showing

27
 28 ¹ This contract language has been translated from Spanish and was submitted by the parties. The parties do not dispute the accuracy of the translation and have based their arguments upon this English translation.

1 the sort of exceptional circumstances that would justify disregarding a forum-selection
2 clause”).

3 **A.**

4 Plaintiffs first argument is that the forum selection clause’s stated preference for the
5 “Courts of Mexico City, Federal District,” is permissive and does not foreclose the parties
6 from litigating their disputes in Arizona, EFI’s domicile. According to Plaintiffs, “that
7 language reflects nothing more than a consent to jurisdiction, not a requirement that
8 jurisdiction lie only in Mexico.” (Doc. 15 at 6.) Plaintiffs also argue that the absence of
9 language indicating that Mexico City, Federal District is the “exclusive” venue for disputes
10 further supports their interpretation.

11 But the clause’s next provision, “waiving to any other jurisdiction that may
12 correspond to the Parties by virtue of their present or future domiciles or for whatever
13 reason,” seems to belie that position. To that point, Plaintiffs suggest that “[t]he waiver
14 simply means that [EFI] could not object to jurisdiction in Mexico based on its domicile
15 (*i.e.*, Arizona).” (*Id.* at 6.) EFI disagrees, arguing that the forum selection clause clearly
16 expresses the parties’ “intent to waive the right to file suit in ‘*any other jurisdiction*,’
17 including those—like this Court—that are based on EFI’s ‘present or future domicile.’”
18 (Doc. 21 at 2.)

19 The Court must review the forum selection clause to determine whether it is
20 permissive or mandatory. The forum selection clause at issue here can be analyzed using
21 basic principles of contract interpretation and without the need of extrinsic evidence. *See*
22 *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009). “Contract terms are to be given
23 their ordinary meaning, and when the terms of a contract are clear, the intent of the parties
24 must be ascertained from the contract itself. Whenever possible, the plain language of the
25 contract should be considered first.” *Id.* (quoting *Klamath Water Users Protective Ass’n v.*
26 *Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)). Applying these principles, the Court finds
27 that the forum selection clause is mandatory.

28 “When only jurisdiction is specified[,] the clause will generally not be enforced

1 without some further language indicating the parties' intent to make jurisdiction
2 exclusive." *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989). Here,
3 when the forum selection clause is read as a whole, the waiver language clearly indicates
4 the parties' intent to designate the courts of Mexico City, Federal District as the exclusive
5 venue for dispute resolution. *See Al Good v. Nippon Yusen Kaisha*, No. 1:12-CV-01882-
6 AWI, 2013 WL 2664193, at *4 (E.D. Cal. June 12, 2013) (analyzing a sentence as a whole
7 to find that a clause was mandatory). Plaintiffs' contention that the waiver language only
8 "means that [EFI] could not object to jurisdiction in Mexico based on its domicile" ignores
9 the final words of the clause. Giving the language its ordinary meaning, the Court finds
10 that the "or for whatever other reason" language at the end of the forum selection clause
11 constitutes "further language" demonstrating an intent to exclude jurisdiction from other
12 courts. To interpret the forum selection clause as Plaintiffs request would render these final
13 words meaningless. *See Doe I*, 552 F.3d at 1081 ("We read a written contract as a whole,
14 and interpret each part with reference to the whole.") (citation omitted).

15 Additionally, that the term "exclusive" is absent from the language of the clause is
16 no obstacle to finding it mandatory. While such term would certainly be sufficient to hold
17 that a forum selection clause is mandatory, it is not necessary. *See Docksider*, 875 F.2d at
18 763 (finding a forum selection clause to be mandatory despite it lacking "any express
19 mandatory term such as 'exclusively'"). Although the Court looks to the intent of the
20 parties from the language of the contract itself, the law does not require magic words.
21 Reading the language as part of a whole, the Court finds that the inclusion of the waiver
22 language at the end of the clause is clear evidence of the parties' intent to give the courts
23 of Mexico City, Federal District, exclusive jurisdiction. Accordingly, the forum selection
24 clause is mandatory. *See Al Good*, 2013 WL 2664193, at *4 ("A mandatory clause is one
25 where jurisdiction is exclusive.").

26 **B.**

27 Plaintiffs next argue that even if the forum selection clause is deemed mandatory, it
28 is unenforceable because the "Mexico City court invalidated the forum-selection clause in

the parties’ agreement[.]” (Doc. 25 at 1; *see also* Doc. 1 at ¶ 9.) Prior to filing this lawsuit, Plaintiffs sought relief against EFI in a “Commercial Oral Process [proceeding] before the Oral Process Courts in Mexico City.” (Doc. 21-1, Declaration of José-David Enríquez-Rosas, ¶ 2.3.) The Oral Process Court dismissed the case for lack of territorial competence. Plaintiffs next sought an Amparo Directo, a constitutional review performed by a higher court, wherein the prior ruling was affirmed. (*Id.* ¶¶ 2.4-2.6.) Assuming the Amparo Directo ruling invalidated the forum selection clause, its determination is neither binding nor dispositive.²

A Mexican court’s role in an Amparo proceeding has been compared “to that of an umpire, in that the court’s sole task is to determine whether the relevant government action is illegal, and if so, to provide the individual with federal protection by granting the [A]mparo.” *Madrigal v. Tellez*, No. EP-15-CV-181-KC, 2015 WL 5174076, at *9 (W.D. Tex. Sept. 2, 2015) (internal marks omitted). Under Mexican law, “decisions of an Amparo court are provisional in nature and only limit governmental action.” *Martinez v. Palmer*, No. 4:21-CV-00520-DCN, 2022 WL 671212, at *3 n.5 (D. Idaho Mar. 7, 2022) (citation omitted). An Amparo proceeding “is a highly complex legal institution” with “a more limited scope than an appeal” and essentially serves as “the means to review and annul unconstitutional judicial decisions.” *United States v. Fowlie*, 24 F.3d 1059, 1064-65 (9th Cir. 1994). As such, United States courts are understandably wary of deciphering the effects of Amparo decisions. *See, e.g., Noeller v. Wojdylo*, 922 F.3d 797, 806 (7th Cir. 2019) (“Even if we could find a reliable record of [plaintiff’s] amparo case . . . we would need to decide what legal conclusions a Mexican court reached based on its analysis of Mexican laws and criminal procedure. That is simply not our job here.”).

In abiding by principles of international comity, this Court need only give conclusive effect to a foreign court’s judgment if certain criteria are met. *See Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). As relevant here, “[n]otice is an element of our notion of due process” and the courts of the United States “will not enforce a judgment obtained

² As explored *infra*, Section C, the parties dispute the effect and meaning of the Mexican court’s Amparo Directo ruling.

1 without the bare minimum requirements of notice.” *Int’l Transactions, Ltd. v.*
 2 *Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003); *see*
 3 *also Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir.
 4 1971) (noting that the “polestar is whether a reasonable method of notification was
 5 employed and reasonable opportunity to be heard was afforded to the person affected”).

6 It is uncontroverted that EFI had no notice of the proceedings in the Mexican courts,
 7 was not a party to the suit, and had no opportunity to be heard. (*See* Doc. 15 at 4.) Thus, to
 8 the extent the Amparo ruling invalidated the forum selection clause, this Court is not bound
 9 to give that finding conclusive effect. *See Embotelladora Agral Regiomontana*, 347 F.3d
 10 at 596 (finding that a district court abused its discretion under principles of international
 11 comity in accepting a Mexican court’s *ex parte* bankruptcy determination). Moreover,
 12 given the provisional nature of the proceedings, the determination of the Amparo decision
 13 does not affect the parties’ rights under federal law. *See Fowlie*, 24 F.3d at 1065 (finding
 14 an Amparo decision to have no bearing on an individual’s rights under a United States-
 15 Mexico extradition treaty).

16 The Court also notes that the parties have not requested that it use Mexican law to
 17 interpret and analyze the enforceability of the forum selection clause despite the clause
 18 seemingly also containing a choice of law provision.³ *See Adams v. Raintree Vacation*
 19 *Exch., LLC*, 702 F.3d 436, 438 (7th Cir. 2012) (finding the issue of the applicable law
 20 waived where neither party requested that the district court apply Mexican law to determine
 21 the enforceability of a forum selection clause that also contained a choice of law provision);
 22 *Yei A. Sun*, 901 F.3d at 1086 (holding that federal contract law applies to the interpretation
 23 of the scope of a forum selection clause); *Weber v. PACT XPP, Techs., AG*, 811 F.3d 758,
 24 770 (5th Cir. 2016) (explaining that the enforceability of a forum selection clause is
 25 governed by federal law). In any event, the Amparo ruling does not foreclose the Court
 26 from analyzing the validity or enforceability of the forum selection clause and cannot by

27 ³ In relevant part, Article Twenty-Sixth of the parties’ agreement states: “For the
 28 interpretation, execution and compliance of this Agreement the Parties expressly submit
 themselves to the applicable laws and to the jurisdiction of the courts of Mexico City,
 Federal District” (Doc. 1-2 at 20.)

1 itself establish or strip jurisdiction to adjudicate the parties' claims.

2 **C.**

3 Plaintiffs last argument opposes the forum selection clause on the basis that they
 4 lack an adequate alternative forum. "[T]he appropriate way to enforce a forum-selection
 5 clause pointing to a . . . foreign forum is through the doctrine of *forum non conveniens*."
 6 *Atl. Marine*, 571 U.S. at 60. A party moving to dismiss on grounds of *forum non conveniens*
 7 must show, *inter alia*, "the existence of an adequate alternative forum[.]" *Loya v. Starwood*
 8 *Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009). Similarly, a forum
 9 selection clause can be set aside if "trial in the contractual forum will be so gravely difficult
 10 and inconvenient that [the litigant] will for all practical purposes be deprived of his day in
 11 court." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).⁴ Following *Atlantic*
 12 *Marine*, "courts must enforce a forum-selection clause unless the contractually selected
 13 forum affords the plaintiffs no remedy whatsoever." *Yei A. Sun*, 901 F.3d at 1092 (citation
 14 omitted).

15 Plaintiffs argue that the forum selection clause is invalid because it "would
 16 effectively deprive [them] of their day in Court." (Doc. 15 at 7.) This is so, Plaintiffs argue,
 17 because the forum selected in the contract, "the courts of Mexico City, Federal District,"
 18 became unavailable to them when the Mexico City court rejected jurisdiction. Plaintiffs
 19 claim that the Mexico City courts provided them no avenue for redress and that it would
 20 be fundamentally unfair to dismiss this case. (*Id.* at 10.) EFI responds that the Amparo
 21 decision provided Plaintiffs with an available forum in Mexico, the courts of the
 22 municipality of Cuautitlán, State of Mexico. (Doc. 21 at 6.) EFI contends that, in finding
 23 the courts of Mexico City, Federal District to lack jurisdiction over this dispute, the
 24 Amparo decision determined that Article 1104 of Mexico's Commercial Code requires
 25 Plaintiffs to sue in Cuautitlán, State of Mexico. (*Id.* at 7.) In an ensuing battle of sur-replies,
 26 the parties' dispute whether the Amparo decision required Plaintiffs to sue in Cuautitlán,

27 ⁴ The Supreme Court identified two other reasons for setting aside a forum selection clause:
 28 fraud or overreaching by a party or if enforcing the clause would "contravene a strong
 public policy of the forum in which suit is brought . . ." *M/S. Bremen*, 407 U.S. at 15.
 Plaintiffs do not challenge the forum-selection clause for either of these reasons.

1 State of Mexico, before coming to this Court. (Docs. 25, 29.)

2 To be considered adequate, a foreign forum must provide the plaintiff with “some”
3 remedy. *Loya*, 583 F.3d at 666 (9th Cir. 2009). As a result, the Ninth Circuit has held that
4 a forum selection clause “remains enforceable even when the contractually selected forum
5 may afford the plaintiffs less effective remedies than they could receive in the forum where
6 they filed suit.” *Yei A. Sun*, 901 F.3d at 1092 (citing *Richards v. Lloyd’s of London*, 135
7 F.3d 1289, 1296 (9th Cir. 1998)). Similarly, establishing the deprivation of one’s day in
8 court is a high standard. Indeed, a “court must dismiss a suit filed ‘in a forum other than
9 the one specified in a valid forum-selection clause,’ even if it ‘makes it possible for
10 [plaintiffs] to lose out completely, through the running of the statutes of limitations in the
11 forum finally deemed appropriate.” *Id.* at 1091 (quoting *Atl. Marine*, 571 U.S. at 66 n.8).

12 Plaintiffs have an adequate alternative forum. This case presents the interesting
13 circumstance in which the parties selected forum can not only provide “some” remedy but
14 arguably already has. Through the Amparo decision, the courts of Mexico City, Federal
15 District, effectively gave Plaintiffs an answer: litigate in Cuautitlán, State of Mexico.
16 Although the parties dispute whether the Amparo decision requires Plaintiffs to litigate in
17 the courts of Cuautitlán, State of Mexico, both sides agree that the Amparo decision
18 identified those courts as an appropriate forum. The Court does not doubt that when
19 Plaintiffs filed suit in Mexico City, they hoped to abide by the obligations imposed in their
20 forum selection clause. But Plaintiffs cannot now, unhappy with the answer furnished by
21 their bargained-for forum, come to this Court to escape a result brought about by their
22 agreement. The Court finds that the Mexico City court’s direction in the Amparo decision
23 does not leave Plaintiffs without any remedy whatsoever. Rather, in directing the parties to
24 litigate in Cuautitlán, State of Mexico, the parties chosen forum of Mexico City provided
25 “some potential avenue for redress.” *Peterson v. Boeing*, 108 F. Supp. 3d 726, 731 (D.
26 Ariz. 2015) (quoting *Ceramic Corp. of Am. v. Inka Mar. Corp. Inc.*, 1 F.3d 947, 949 (9th
27 Cir. 1993)).

28 Likewise, the Court finds that dismissal of this suit on *forum non conveniens*

grounds would not deprive Plaintiffs of their day in court. Neither party has argued that litigating in the courts of Cuautitlán, State of Mexico, would be so gravely difficult or inconvenient. That Plaintiffs would prefer to litigate here cannot weigh upon the Court's determination. *See Yei A. Sun*, 901 F.3d at 1091 ("Where the parties have agreed to a forum-selection clause, they 'waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.'") (quoting *Atl. Marine*, 571 U.S. at 64). So long as "there exists a basically fair court system in that forum that would allow plaintiff to seek some relief[.]" this Court may enforce the parties' forum selection clause. *See Weber*, 811 F.3d at 774 (reasoning that the fact that certain remedies are unavailable in a foreign forum "does not change the calculus"). Courts in the United States "have found Mexico to be an adequate forum for litigation, despite differences in Mexican and American substantive and procedural laws." *Aimsley Enters. Inc.*, 2020 WL 1677330, at *7 (citing *Loya*, 583 F.3d at 666-67); *see also Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672 (5th Cir. 2003). And Plaintiffs have not provided the Court with a reasonable basis to believe that they will be afforded no remedy whatsoever in the courts of Cuautitlán, State of Mexico.

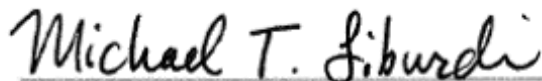
III.

Accordingly,

IT IS ORDERED granting Defendant's Motion to Dismiss Complaint (Doc. 12) and dismissing this case.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in Defendant's favor and close this case.

Dated this 3rd day of April, 2023.



Michael T. Liburdi
United States District Judge